UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CALIFORNIA

ALLIANCE MECHANICAL, INC.

and Case 27-CA-21338

ROAD SPRINKLER FITTERS LOCAL UNION No. 669

Kristyn Myers, Denver, Colo., for the General Counsel.
Natalie C. Moffett, of the ***Osborne Law Offices***, Washington, D.C., for the Charging Party.
Ronald Aho, Eagle, Colo.*,* President, Alliance Mechanical, Inc.*,* for Respondent.

DECISION

Statement of the Case

JAMES M. KENNEDY, Administrative Law Judge: This case was tried in Eagle, Colorado on April 28, 2010, pursuant to a Complaint and Notice of Hearing issued on January 28, 2010, by the Regional Director for Region 27. The complaint is based upon an unfair labor practice charge filed on August 19, 2009 [1] by Road Sprinkler Fitters UA, Local Union No. 669 (Local 669 or Charging Party) and an amended charge filed on November 17. The complaint alleges that Alliance Mechanical (Alliance Mechanical or Respondent) committed certain violations of Section 8(a)(1) and Section 8(a)(3) of the National Labor Relations Act (the Act). Respondent denies the allegations. All parties have filed post-hearing briefs and they have been carefully considered.

Issues

The principal issue is whether Respondent failed to consider and failed to hire Charles Aaron Hoffman in violation of Section 8(a)(3) and (1) of the Act. The complaint also alleges that Respondent's president, Ronald Aho, coercively interrogated Hoffman about his union membership status and told Hoffman he would not hire union members, both in violation of Section 8(a)(1) of the Act.

Respondent denies that it interrogated Hoffman about his Union membership status. Moreover, Respondent asserts that it did not tell Hoffman that Respondent does not hire Union members, averring that Respondent has willingly hired Union members in the past. Respondent

[1] All dates are 2009 unless otherwise indicated.

asserts that it considered Hoffman for employment, but was unable to hire him because there was no job available for which he was qualified, as it was only hiring a sprinkler service technician and had been looking for such an individual for over 3 years.

Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

I. Findings of Fact

Jurisdiction

Respondent admits it has been at all material times a Colorado corporation operating a fire sprinkler business in Gypsum, Colorado, where it is in the business of installing and servicing fire sprinkler systems for commercial and residential clients. During the twelve-month period ending September 30, 2009, Respondent, in conducting its business, purchased and received at its Gypsum facility goods valued in excess of $50,000 from other enterprises located within the State of Colorado, each of which had received the goods directly from points outside the State of Colorado. Accordingly, I find Respondent is, and has been, at all material times, an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. In addition, Respondent, at the hearing, admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Background

Ronald Aho is the owner and president of Alliance Mechanical. Alliance Mechanical is located in a relatively remote area, Eagle County, Colorado and services the Eagle River Valley[2] portion of the Western Slope. Lightly populated, this area has little industry other than resorts. Aside from Aho, Respondent, on the date of the hearing, employed four people: a foreman/supervisor, a sprinkler fitter (not yet a journeyman), an apprentice service mechanic, and an office manager. Aho makes all hiring decisions and there is no evidence that Respondent has any written hiring policies or procedures. Respondent was for a period in the business of plumbing and heating in addition to installing new fire sprinkler equipment and servicing existing fire sprinklers. It abandoned the plumbing and heating side of the business several years ago in favor of the fire sprinkler business.

Before abandoning the plumbing and heating side of the business, Respondent had a collective bargaining agreement with United Association (UA) Local 145 in Grand Junction, Colorado. Under this agreement, Respondent employed UA journeyman pipefitters to install fire sprinklers. In 2006, the Charging Party, a UA sister Local having near-national jurisdiction over fire sprinkler work, requested that Local 145 discontinue fire sprinkler work. Local 145's acquiescence resulted in Local 669 taking sole jurisdiction over fire sprinkler work in the part of Colorado where Respondent normally conducts its business. The takeover required those Local 145 members working for Respondent to discontinue providing fire sprinkler installation labor. To deal with the change, Respondent agreed to accept two Local 669 pipefitters to perform its fire sprinkler work, but under the terms of Respondent's collective bargaining agreement with Local 145.[3] That collective bargaining agreement later expired and has not

[2] This strip, following Interstate 70, is about 100 miles long, from Eagle running east to Breckenridge or west to Glenwood Springs.

[3] Respondent employed Local 669 members, Monty Gamble and Mark Newbaker, under this arrangement.

been renewed as Respondent downsized in the face of the economic downturn. Due in part to Respondent's west-central Colorado location, Local 669 members, usually from Denver, tend not to work for Respondent for extended periods of time. Moreover, new construction employment opportunities are not as plentiful in Respondent's location as in Colorado's urban locales.

In October 2008, well beyond the Section 10(b) limitations period and not part of this complaint, Respondent hired Local 669 pipefitter, Julio Rodriguez. Respondent required him to sign a "yellow-dog agreement"[4] in which Rodriguez renounced his membership in the Union and agreed not to attempt to organize Respondent's employees. Although Aho testified that he had Rodriguez sign the contract to protect the employee from trouble with the Union, his insistence that his employees sign the agreement is a clear indication that Respondent harbors union animus.

Rodriguez was laid off in February for lack of work. No new employee would be hired until July 30, when Aho hired Juan Rodriguez, a laborer at a rate of $10 per hour. That hire was followed about 4 weeks later, in August, by an apprentice service technician – David Skluzacek.

Aho and Amber Fuller, the office manager, both testified that the only position Respondent was seeking to fill after laying off Julio Rodriguez in February was an experienced or lead service technician. This was a position which Aho had been trying to fill for over 3 years. The service technician position requires a set of skills distinct from that of a pipefitter. Service work entails an employee inspecting an existing fire sprinkler system for a client and determining what aspects of the system need to be serviced or updated to meet code requirements and other region-specific regulations. Service technicians are required to have certain certifications because the technicians are required to inspect wet systems[5], rather than install new ones. In addition to inspecting the fire sprinkler systems, a service technician is required to make recommendations to clients regarding maintenance and upgrades of their existing systems. As such, the Alliance Mechanical service technician position entails significant sales skills when dealing with clients. Aho had been performing all of the service work for Respondent himself because he had been unable to find a qualified service technician.

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[4] A "yellow-dog contract" is "an employment contract forbidding membership in a labor union." *Black's Law Dictionary*. As the Board has observed, "Even before the passage of the Wagner Act, Congress enacted broad prohibitions against yellow-dog contracts. It is axiomatic that such agreements and their solicitation are barred under the 8(a)(1) prohibition of coercion directed at employee exercise of rights protected by Section 7." *Eddyleon Chocolate Co.*, 301 NLRB 887, 887 (1991). Indeed, requiring a yellow dog contract was made criminal for railroads by the Erdman Act in 1898. Though the Erdman Act was declared unconstitutional in 1908, yellow dog agreements were again outlawed by the Norris-LaGuardia Anti-Injunction Act of 1932. And, they were more broadly barred by the Wagner Act of 1935, whose pertinent provisions are found today in the National Labor Relations Act. See generally, Higgins, ed., *The Developing Labor Law* (2006). Parenthetically, I note that even Colorado state law bars yellow dog agreements. See Colo.Rev.Stat. §8-3-106, §8-3-108.

[5] Wet systems are fire sprinklers systems which contain water and/or anti-freeze. Pipes are generally dry when they are first installed but once they are installed and working they are filled with liquid and are then referred to as "wet systems."

Hoffman

In early March 2009, Hoffman applied for a job with Alliance Mechanical. His application is dated March 4.

At the time Hoffman applied, Respondent was not advertising any open positions. It did not do so until April. Between April and November 2009, Respondent twice posted advertisements for what appears to be the same job.[6] The first advertisement ran between April 14 and April 20 and stated the position was for a "Certified backflow teck [sic]."[7] The second advertisement ran between June 15 and July 14 and specifically stated the position was for a "Fire Sprinkler Service Journeyman." The second advertisement's description stated: "[P]erform fire sprinkler inspections residential & commercial." Neither called for a pipefitter, but both can be seen as seeking an experienced service technician.

Hoffman testified that he applied after Rick Gessner, Local 669's Denver-based business representative, suggested that Alliance Mechanical might be hiring.[8] Hoffman is a recent arrival to the Gypsum/Eagle area, originally from Arizona. He has been a Local 669 member for about 11 years and a journeyman pipefitter for approximately 6 years, working primarily in Arizona. As a member of Local 669, he had found work in Colorado under its collective bargaining contract with Western States Fire Protection (Western States), a signatory contractor. However, due to the economic downturn, he was laid off in February and began seeking work elsewhere.

Hoffman testified he went to Respondent's office one morning in early March to seek work. He first encountered office manager Amber Fuller with whom he had a short conversation. She gave him an application which he says he took home and returned it the next morning. Although Hoffman returned at least twice, he never met Aho in person because Aho was never there. Fuller had given him Aho's cell phone number, so he eventually called it, perhaps the following week, and had a short conversation with Aho.

According to Hoffman, during the call Aho referenced his application and noted his Arizona employment and the fact that he had worked for Western States. He says Aho asked him if he was union and Hoffman replied that he was.

> [Witness HOFFMAN]…And then from there, he just told me out and said, "I don't hire union people. I won't -- I don't hire union people."
> Q. [By Ms. MYERS] Did you say anything?
> A. Yeah. I said, "Well," I said, "I'm just looking for work." I said, "I have the experience, and I have experience and knowledge about it." And then he said, "I don't hire union people." He's like, "I know your BA." And I was like -- he mentioned that "I know your BA [Rick] Gessner." I was like, "Yeah." He's like, "I just -- I won't hire union people, I

[6] These advertisements were posted on CareerBuilder.com.

[7] The advertisement called for "ASSME" certification, however, this seems to be an error as ASSE is a common backflow certification. Typically, journeyman pipefitters do not carry that certification.

[8] Gessner testified, "…I told Aaron to give Mr. Aho a call. He was looking for sprinkler fitters." In fact, of course, Aho was not looking for fitters. Why Gessner said that to Hoffman is unclear. At best, Gessner didn't know what Aho's employment opportunities were; at worst, he was providing Hoffman with misinformation. Either way it gave Hoffman false hope which would lead to resentment when that hope was dashed, for he would think Aho, not Gessner, was lying.

don't hire union people." And I was like, "What do you mean?" He's like, "Well, you did it to yourself," which I was a little kind of taken aback.

* * *

. . . I said, "I'm just looking for work." I said, "I just want work." I said, "I don't care whether it's union or non-union," you know. I said, I was, "This is the way I provide, you know, provide for my family. And I need, just need work." And he just told me on the phone, he's like, "I don't hire union people. I won't hire union people."

Q. Okay.

A. And I -- and I was like, "Well, you want to give me a chance?" He's like, "No." And I said -- well, I said, "All right." He said, I -- he said, "Have a good day." And I said, "Okay, have a good day."

Q. Do you recall anything else about that conversation?

A. He had mentioned something – Rick Gessner. I said, I -- on the phone, he said, "I don't care for Rick." Which I don't know -- he said, "I don't care for Rick." And I was like, I said -- that's when I said, "Well, I'm just looking for work." I said, "I -- all I want is some work," I said, "I'm just looking for work."

Hoffman's version about the application and interview process is nearly 180 degrees from that of Aho and office manager Fuller. While Aho did not specifically deny Hoffman's testimony, he did say when he was asked for the words which he used, "I do not remember any exact words. I would not have told him was [sic] I did not hire union workers, I know that."

The two versions require a credibility determination that goes well beyond the surface. After giving the matter careful consideration, including all the witnesses' relative demeanor as well as their relationships (Fuller being Aho's employee), and recognizing that Aho harbors union animus, I nevertheless find Aho and Fuller's version to be the more credible. The Aho-Fuller version is detailed in the sub-sections below:

1. Timing and in person meeting v. telephone calls. Hoffman claims he went into the office twice, speaking only to Fuller. He says he went in on a day in early March, obtained an application, took it home, filled it out and returned it the next day. On each occasion that he returned Fuller told him Aho wasn't there, but had repeated he was usually in the office in the late afternoons. Hoffman says his only conversation with Aho was by telephone a week after leaving his application and after failing to connect at the office on at least two occasions. He had never seen Aho in person before the hearing.

Fuller has the best and most consistent memory of the three.[9] She remembers Hoffman came in one morning during which she provided him with an application and he returned with it that same afternoon after having filled it out. (GC Exh. 2) She testified that Aho was then present in the office and the two had a fairly standard conversation about a job.

[Aho]: Are you sure, is Aaron Hoffman -- is the person that we're talking to that came in the office and talked to me?

[Fuller]: A hundred percent, no. Just because we get so many applications and Ron does interview so many people. But yes, I do remember Aaron Hoffman. I do remember him coming in and asking for an application. I do remember it -- him turning it back in, and I do remember him talking to you, Ron. Yes, I do.

[9] Respondent's office in Gypsum at the time consisted of a single room, perhaps 10 x 10 feet. Fuller was usually present for every interview which occurred there. It has since been moved to Eagle.

Aho didn't recognize Hoffman at the hearing, but was pretty sure he had spoken to him in person at the office. Both he and Fuller did acknowledge that Fuller had given Hoffman his cell phone number and that he has sometimes had conversations with job applicants on the phone. Still, he was pretty sure his conversation with an applicant with an Arizona fire sprinkler background, i.e., Hoffman, was in person.

2. Nature of the job. When asked to say whether Fuller told him the nature of the employees Aho was looking for, Hoffman denied that she said anything about it. (Q. Did Amber tell you what kind of – Amber's my office manager. Did she say what kind of help I was looking for? A. No.) Hoffman says she said something about an out-of-state applicant, but not what that job was.

Similarly, in response to questions by counsel for the General Counsel, Hoffman testified:

> Q. Okay. Did the owner, Ron, ask you about your educational background during that conversation?
> A. No.
> Q. Did the owner, Ron, ask you about your job experience?
> A. No.
> Q. Did the owner ask you if you had experience doing surface (sic) [service] work?
> A. No.
> * * *
> Q. Did the owner, Ron, tell you he did not have any journeymen jobs available?
> A. No.

Fuller testified that she indeed did tell Hoffman that Aho was looking for service technicians:

> Fuller: With Aaron, like everybody, he came in, asked for an application, asked if we were hiring. Just like with every single other person that comes in, and what we've been looking for, for the three years that I have been working there, that I -- and I know that I did tell him that we were looking for a service technician, somebody with that experience.
>
> He did tell me that he did have that experience. And he actually filled out the application that day and brought it back to me that day because I did tell him mornings were bad. And that Ron was usually back in the office in the afternoons because he would be finished up with the service work that he was doing. Aaron did bring back the application that afternoon and spoke with Ron in the office.

When Hoffman brought the application back that afternoon, it contained nothing about any service technician experience. His application only sought journeyman sprinkler fitter (pipefitter) work.

Furthermore, Fuller recalled that during the afternoon conversation between Aho and Hoffman that Aho specifically told Hoffman he was looking for a service technician.

> Fuller: Ron did ask if [Hoffman] had service experience. Aaron stated no, and he did state that he had several years experience with installation and went over his experience and knowledge in that area. Aaron did make a comment about that he wasn't concerned with the Union and that he needed a job. And Ron did ask him every question that he asks everybody that he talks with. You know, his experience, does he have service

knowledge? He might throw out a question about a certain system to see if they really do know what they're talking about. And he does do this with every single person that I've ever been at the office and witnessed. He pretty much does ask the same questions.

Aho's recollection was quite similar.

WITNESS [AHO]: I thought Aaron was the person that came into my office, and I actually talked to.
JUDGE KENNEDY: Oh, was he -- you say that you spoke to him in person?
THE WITNESS: That's my recollection. But I could be wrong; we've had a lot of people come in. And being a 669 member –
JUDGE KENNEDY: Well, I mean as you sit here looking at him today, do you remember that individual?
THE WITNESS: Not specifically, no.

* * *

THE WITNESS: I would have asked him specifically about his service experience because I was laying off fitters at the time. I wasn't hiring fitters.

* * *

JUDGE KENNEDY: Do you actually remember asking him about service experience, or do you just think that that's –
THE WITNESS: I'm –
JUDGE KENNEDY: -- a probability, that you would have asked him?
THE WITNESS: I think it's more than a probability.

I find here that Hoffman's testimony that both Aho and Fuller said nothing about looking for a service technician to be untrue. They had been looking for such an employee for several years. It is a near-certainty that Aho asked about that experience. Beyond that, it is highly probable that Fuller did as well. Hoffman's testimony that she referred to an out of state applicant suggests that she did, since pipefitters are common, whereas experienced service technicians are not. In addition, there is no doubt in my mind that Aho told Hoffman he was not hiring journeymen [fitters]. Aho had laid off Rodriguez in February, which was the exact same time Western States had laid off Hoffman. So why does Hoffman deny that Aho told him he wasn't hiring installers? Even Gessner allows that work in the field was slow (it still being late winter); wouldn't that observation apply throughout Colorado, including the more depressed area of the Eagle Valley? Is Hoffman trying to testimonially create a sprinkler fitter job where there was none?

3. Hoffman's Application v. Hoffman's Testimony. In his application Hoffman said he was seeking a "pipefitter" job. He listed three fire sprinkler companies for whom he had worked. He described his work there as "install pipe, cut heads, hang main, T.I. [tenant improvement], sprinkler heads and warehouse work." At no point does he say he had service tech or sales experience. As for training in the field, he simply said, "I went through the apprenticeship program."

When he testified, Hoffman stated he possessed both a power lift device certification and an OSHA safety certificate. Neither of these is mentioned in the application. He also testified that his Union apprenticeship included what appears to be enhanced industry knowledge through an on-line program arranged between the Local 669 and Pennsylvania State University. This information was not included, either. Why not? Why would Hoffman not put himself in the best possible light for a potential employer?

Hoffman's testimony:

Q. [By Ms. MYERS] Have you had any extended experience in service work on fire sprinklers?
A. Yes.
Q. Did you put that on your application?
A. I put down that --
Q. Did you put on your application that you had any service experience?
A. No, I just put down companies that I worked for.

I think the obvious answer is that Hoffman, faced with an employer who was looking for a qualified service technician, did not do so because knew he did not fit the only job available.

Consistent with his testimony, Fuller, as noted above, remembers him telling her that he did have service technician experience. I find, therefore, that Hoffman hesitantly tried to convince Fuller that he had such experience. Even so, he did not tell her he held a back-flow certification, something an experienced service techncian would possess. Such a certificate would have led Aho to discuss his application in more detail. Clearly, his "extended" experience with service work was too minimal to be realistically presented to Aho. So why did he claim it orally first to Fuller and later to me at the hearing? The answer is that he knew a more careful inquiry would reveal that he was inflating his service skills, and that is why he never claimed service technician experience on his application, even though he is orally, even under oath, willing to make the claim.

In addition, Hoffman knew he needed to be believed concerning his contention that Aho never asked him about his service work experience, meaning that he wants to convince me that the only job he and Aho discussed was a journeyman sprinkler fitter and that was the job Aho would not offer him because of his Local 669 background.

Furthermore, why did Hoffman contend that his conversation with Aho was on the telephone? Both Aho and Fuller have credibly testified that his interview was in person. Is that because he wanted to avoid witnesses, such as Fuller, who could credibly deny the conduct alleged to be in violation of Section 8(a)(1)? I tend to think so.

I regard Hoffman's testimony and his claim to Fuller that he had experience as a service person to be misleading. Furthermore, his testimony about pleading for a chance ["Well, you want to give me a chance?"] makes no sense in view of the fact that there was no job to offer him. Hoffman's testimony, taken as a whole, leads me to conclude that his description of what Aho told him during the interview cannot be trusted. There is simply too much inconsistency in his testimony. I find it to be contrived.

4. Aho's Affidavit. The General Counsel, properly in my opinion, argues that Aho's credibility is also in question. She notes that his testimony is inconsistent with his investigative affidavit. And, it is true that there is some definitional inconsistency, which I recount below. However, in general, his affidavit is consistent with his testimony. Taken 7 months after Hoffman applied, Aho says that during the time period in question, early March, any hiring effort would have only been his search for a service technnician. ("If I was hiring at this time I wanted to hire a service person.") He describes the 5 years of experience he was looking for in a candidate and wanting to find someone local who could respond to calls. He states that he did not hire Hoffman because his company did not have a position for him, denying that Hoffman's union background had anything to do with not offering him a job.

The inconsistency arises from what followed. In the affidavit Aho said he had hired "two installer apprentices since March 2009. I hired one about three weeks ago and the other one five or six weeks ago."

The complaint asserts that one of those two jobs should have gone to Hoffman, since, as a journeyman, Hoffman was well qualified to perform that work.

However, the first job was the $10 per hour job given to Juan Rodriguez at the end of July.[10] The second was the one given to David Skluzacek in the last week of August. The credible fact scenario, contrary to the affidavit, is that Juan Rodriguez was hired as a laborer and Skluzacek was being groomed to learn service technican work. Indeed, Skluzacek's application form states that he was applying for the service technician job.[11] And, those are the facts no matter what Aho said in his affidavit. It was not until the hearing that Aho became aware of his own imprecision. Yet his inexactitude on a matter of definition cannot override the underlying facts.

Accordingly, I do not concur that, taken in context, Aho's descriptions of Juan Rodriguez' and Skluzacek's jobs render him not credible. Accordingly, I find that Aho's credibility is unshaken by this apparent inconsistency.

II. Analysis and Conclusions

On the foregoing facts, I am unable to find either a violation of Section 8(a)(1) of the Act or a violation of Section 8(a)(3) for a refusal to hire. Even so, I find that there has been a violation of Section 8(a)(3) by Respondent for failing to consider Hoffman for employment.

a. Alleged Unlawful Statements

The complaint alleges that Aho coercively interrogated an employee (Hoffman) about his union membership. It also asserts that Aho, in telling Hoffman that he does not hire union people, threatened him in a way which deprived him of his Section 7 rights. Above, I have not found Hoffman to have given credible testimony. While it is not necessary to repeat my specific findings above, I note that in general it is not Aho's modus operandi to coercively interrogate or make threats to prospective applicants. He cannot afford to, since he needs skilled fitters and an experienced service technician. He knows that union-trained sprinkler fitters are valuable assets and possess skills he wants to use. So he is alert to such individuals and prefers them to people whose training is not as rigorous. This means he simply looks at applications and can

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[10] In his affidavit, Aho also observed he had two jobs then under way, but when they finished, he'd be laying off half the crew, no doubt meaning laborer Juan Rodriguez.

[11] Respondent hired David Skluzacek as an apprentice service technician. Aho testified that he hired Skluzacek for this position because Skluzacek had several years of sales and management experience in addition to pipefitting experience, which he listed on his application. Indeed, Skluzacek had owned and operated a bicycle shop. Aho's decision to hire Skluzacek was largely based on the fact that Aho personally knew Skluzacek, including his work habits, his prior business ownership experience and the fact that Skluzacek prioritized the need to make sales. Aho testified that he hired Skluzacek as an apprentice service technician so he could train Skluzacek to eventually fill a lead service technician position.

That Skluzacek may have needed some time learning the business, including installing sprinklers before taking on the service duties, does not undermine Aho's testimony concerning why he hired Skluzacek. The General Counsel's argument to the contrary is rejected.

often determine if the applicant has a union background. Moreover, as Fuller noted, Aho generally assesses whether an individual is a good candidate by asking him about some type of fire suppressant system. Here, Hoffman's application announced his union apprenticeship training and his journeyman status. It also told Aho that he had worked for a contractor, Western States, which Aho knew to be under a union contract. He did not need to interrogate Hoffman to learn about his union status. And, if he had, based on what was in the application, it would have been permissible under the Act. See *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Instead, Aho's method to avoid union organizing was, simultaneous with an employment offer, to require such an applicant to sign the yellow dog agreement. That is the procedure he used when he hired fitter Julio Rodriguez. It, or some acceptable substitute, may have been employed when in late 2009, he hired an experienced lead service technician from Grand Junction, Brice Hawley.[12]

My judgment is to accept Aho's repeated contention that he has hired union employees and has no problem with doing so—so long as they promise not to organize his company.

As Aho operates in that fashion, and as I do not believe Hoffman's testimony about the interview process, I find that the General Counsel has failed to prove, by credible evidence, that Aho interrogated Hoffman about his union membership. Nor did Aho tell Hoffman, as alleged, that he did not hire union people, because he does[13], though he wishes them to forgo their rights under the Act. In any event, the questions Aho did ask were limited – mainly to Hoffman's service technician background – and had no impact on Hoffman's Section 7 rights. The principal reference to Hoffman's connection to the Union came from Hoffman's application, not from anything Aho initiated. This aspect of the complaint will be dismissed.

b. Discriminatory Refusal to Hire Hoffman

The complaint essentially concedes that Respondent did not unlawfully refuse to hire Hoffman in March (the complaint says April). Instead, it focuses on late July and August when Respondent hired Juan Rodriguez and later Dave Skluzacek. I have earlier found that Juan Rodriguez was hired as a $10 per hour laborer or helper and Skluzacek was the apprentice service technician. I have further found that Hoffman had applied for a journeyman sprinkler fitter position. His last rate of pay for that job was $31 per hour, more than three times the laborer's rate.

On a factual basis, therefore, Hoffman was not in the running for the job given Skluzacek. He did not supply the background, did not say he held a backflow certificate and did not claim any sales experience. If he had those qualifications, he didn't put them on his application. He simply never presented himself as trained for that job. Indeed, my assessment of Hoffman as he testified was that his verbal skills are not consistent with those required of a salesperson.

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[12] Hawley is referenced only obliquely. Fuller said he came to them saying he had been expelled from his union, supporting it with an odd story about the union taking away all his benefits. Hawley did not remain employed long as the 250 mile round trip from Grand Junction became too taxing. Local service technician trainee Skluzacek's progress may have had an impact as well.

[13] As noted, he has hired, in addition to Julio Rodriguez, Gamble and Newbaker, though the latter two came as a result of an agreement with Local 669.

In the past, it seems likely that Hoffman had performed laborer work in the industry. He had served a five-year apprenticeship and had undoubtedly performed the same sort of work assigned to Juan Rodriguez. Although Hoffman testified that he would have taken such work at $10 an hour, I find it unlikely. He might have taken an apprentice fitter's job if Aho had one available. That job paid $18 per hour; however, Aho did not have such a position open.

The Charging Party argues that Hoffman's application is irrelevant even though it concedes the application gave Aho no notice of Hoffman's supposed other qualifications. In support of that argument it cites both *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3rd Cir. 2002) and *Americlean*, 335 NLRB 1052, 1053 (2001). Contrary to its contention, however, *FES* specifically holds that there can be no discriminatory refusal to hire if there is no job. ("…absent proof of a job opening there can be no discrimination in regard to hire…") *FES*, supra, at 24 (internal quotation marks omitted). *Americlean* fares no better as it is factually distinguishable, and certainly does not stand for the proposition that a prospective employer is obligated, as the Charging Party implies, to go beyond the application to determine if an individual meets the company's hiring standards. As *FES* says, the burden is on the General Counsel to demonstrate that the applicant has the qualifications for the job.[14] No doubt Hoffman was qualified as a journeyman sprinkler fitter. Even so, the fact that he failed to disclose any other qualifications is far from irrelevant as the Union argues.

Counsel for the General Counsel makes much of the fact that Aho seems inconsistent with respect how he handles older applications. At the hearing, he said, "I don't typically go back and look at old applications." In the amended answer he said, "I would keep his application on file in case I ever did have an opening requiring his experience." Frankly, these are not inconsistent at all, for at no point did Respondent have an opening which fit Respondent's requirements. One does not go back and check 6-month-old applications for journeymen fitters when one is hiring laborers and service technician apprentices. Had Aho needed a journeyman sprinkler fitter, he may well have gone back to his file of applications. But such an employee was not needed, so he did not.

The General Counsel also observes that Respondent did not call Skluzacek to corroborate Aho's testimony about why he was hired. From that, it argues that I should draw the adverse inference that Aho's explanation should not be credited and that I should find that Skluzacek was hired as a sprinkler fitter. Board law regarding the discretionary drawing of an adverse inference against a party who did not call a witness is set forth in *International Automated Machines*, 285 NLRB 1122, 1123 (1987). That case first requires a determination over whether the uncalled witness may reasonably be assumed to be favorably disposed to that party. That is not clear here, even presuming he is happy to be employed and wishes to remain so, since Skluzacek is simply an employee whose personal inclinations toward Aho are not actually known,. Second, we know from the evidence (see GC Exh. 6, the application form) that Skluzacek has a construction background, has pipefitting/welding experience, has knowledge regarding basic construction, has sales experience, understands profit and that he specifically applied for the service technician job. We also know that Aho has for years been looking for someone capable of service work, or at least someone who could be trained for it. Therefore, even if I grant that an adverse inference could be drawn, meaning to infer Skluzacek would not corroborate Aho's purpose in hiring him, that inference would never be persuasive when

[14] Hoffman's use of the abbreviation 'TI' in his application is not, contrary to the Charging Party's brief, a reference to service technician duties. It is simply an abbreviation for 'tenant improvements,' i.e., remodeling work.

weighed against evidence actually in the record.[15] No inference can stand against concrete evidence: here, Skluzacek's application and his relevant experience. Accordingly, the General Counsel's request for an adverse inference is rejected.

The facts here mandate a clear finding that Respondent was not hiring journeymen sprinkler fitters in July or August. As *FES* requires there to be a job opening, and there was not, it follows that no Section 8(a)(3) and (1) refusal to hire violation occurred here. I shall recommend that this portion of the complaint be dismissed.

c. Discriminatory Refusal to Consider Hoffman for Hire

In determining whether the General Counsel has made out a prima facie case of a discriminatory refusal to hire scenario, on first blush it might appear that if there were no jobs available, then it would follow that there would be no refusal to consider. But the Board said in *FES*, supra at 15:

> The Board has long held that hiring need not take place in order to find an unlawful refusal to consider union applicants for employment.[19] However, the Sixth Circuit in *Fluor Daniel* and the Respondent have asserted that there can be no violation of Section 8(a)(3) when there are no jobs available. Their position is that Section 8(a)(3) only prohibits discrimination "in regard to hire" and there can be no such discrimination in the absence of hiring. We do not find this position persuasive.
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> [19] See, e.g., *Shawnee Industries, Inc.*, 140 NLRB 1451, 1452–1453 (1963), enf. denied on other grounds 333 F.2d 221 (10th Cir. 1964).
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> A refusal to consider an applicant on the basis of union activity or affiliation has at least two independent consequences, either of which would warrant a remedy, given the purposes of the National Labor Relations Act. First, the refusal excludes applicants from the hiring process, whether or not job openings are available at the time of application. Such excluded applicants are then not within the pool of applicants for whom future jobs may become available. There is no question that an obstruction of this sort constitutes discrimination "in regard to hire" even if there are no job openings at the time it is imposed. Second, such a discriminatory refusal is a deterrent to employees' engaging in their right of self-organization. It is just as discouraging, and just as obviously discrimination in regard to hire, as the legendary "No Irish need apply" signs of decades past.
>
> The Supreme Court has long recognized that discrimination against union labor in hiring has reverberations beyond the refusal to hire an individual employee. In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), the Court emphasized that such discrimination was a serious impediment to the exercise of the right to organize. In holding that the 8(a)(3) proscription of "discrimination in regard to hire" extended to discriminatory practices towards applicants for employment, the Court relied on its understanding of the policies of the Act. It stated:

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[15] The cases cited by the General Counsel in support, *Douglas Aircraft Co.*, 308 NLRB 1217, n. 1 (1992); *George C. Foss*, 270 NLRB 232, 234-35 (1984), enfd. 752 F.2d 1407 (9th Cir. 1985); *Martin Luther King Jr. Nursing Center*, 231 NLRB 1, n. 1 (1977), either rely on an earlier rule of law or relate to a point of law not in question here. Accordingly, they are of no assistance in resolving the request.

> Of compelling consideration is the fact that words acquire scope and function from the history of events which they summarize. We have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper. Such an embargo against employment of union labor was notoriously one of the chief obstructions to collective bargaining through self-organization. Indisputably the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act. The prohibition against "discrimination in regard to hire" must be applied as a means towards the accomplishment of the main object of the legislation. [Id. at 185–186.]

The Court's basis for concluding that discrimination against union applicants was an impediment to organizing was as follows:

> Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. [Id. at 185.]

The *Phelps Dodge* Court was not faced with a refusal to consider union applicants where there were no job openings. However, the Court's rationale for finding that Section 8(a)(3) extends to applicants for existing openings applies with equal force to a situation where there are no immediate openings. Preventing union applicants from entering the pool of applicants for future job openings is as much an obstacle to collective bargaining through self-organization as is refusing to hire union applicants for current openings. In both cases, employees are cut off from entering the work force, currently or at a future time, where they can exercise the right to organize. In both cases, the discrimination undermines the principle of freedom of organization, which the Act envisions as a central means of attaining industrial peace.

Accordingly, the facial logic I described above is unavailing. I am, therefore, obligated to look at all of the surrounding circumstances relating to Hoffman's application to determine if he was faced with an unlawful policy which would have denied him employment had there been a job. See *C & K Insulation*, 347 NLRB 773, 773 (2006) ("[r]ather, in determining whether an employer has excluded applicants from the hiring process, the Board considers all of the surrounding circumstances"). See also, *Wayne Erecting, Inc.*, 333 NLRB 1212 (2001).

Looking to the surrounding circumstances, it is clear that Respondent does maintain a policy which is designed to interdict employees who wish to utilize their statutory right to union membership, together with the connected activities, organizational or not, which the Act guarantees. Here, Respondent requires its employees who are union members to demonstrate that they will not engage in union activity while it employs them – the requirement that they sign the yellow dog contract. As noted above, these contracts are illegal. But they are more than simply illegal – they specifically require employees to cast off rights which the Congress has provided for their protection. This undermines the Congressional purpose behind the Act. It cannot stand.

It will be recalled that the yellow dog contract policy was applied to Julio Rodriguez who came and went before Hoffman ever applied. Moreover, that policy, as foreseen by the Supreme Court in *Phelps-Dodge*, quoted by the Board in *FES*, seems to have had an effect on Brice Hawley, who was hired sometime late in 2009, after the Juan Rodriguez/Dave Skluzacek hires. Accordingly, I find that at the time Hoffman filed his application Respondent required new hires to sign yellow dog contracts or to otherwise renounce union representation as a condition of being hired. Respondent offers no defense to the policy.

I find, therefore, that Respondent's policy is a continuing barrier to employees who wish to maintain their union membership or who wish to exercise the rights guaranteed them under Section 7 of the Act.[16] It is tantamount to an unlawful refusal to consider for hire. As the Board said in *FES*, discriminatory refusals to consider for hire violate Section 8(a)(3) and (1) of the Act. I so find.

III. The Remedy

Having found that Respondent has engaged in a significant unfair labor practice, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. That unfair labor practice was to burden prospective and new employees with a yellow dog policy under which those individuals were forced to forgo their Section 7 rights. Respondent shall be ordered to cease and desist maintaining that policy and any policy which has the same purpose. However, due to the fact that the policy did not result in the refusal to hire the alleged discriminatee, Aaron Hoffman, I do not find that Hoffman is entitled to any remedy at this stage. Nevertheless, the policy has remained in place since March 2009 and has not been shown, on this record, at least, to have been rescinded, much less cured. There has certainly been no Board remedy applied to the policy. Therefore, in the compliance process, Respondent shall be ordered to supply the names and dates of all job applicants since March 2009. In the event that Respondent has refused to consider any individuals under that policy since that time, they shall be made whole for that unlawful refusal. Once identified, backpay, if any, shall be computed on a quarterly basis from the date of the discharge to the date Respondent makes a proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The affirmative action shall also require Respondent to post a notice to employees announcing the remedial steps it has undertaken.

Based on the above findings of fact, I hereby make the following

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Road Sprinkler Fitters Local Union No. 669 is a labor organization within the meaning of Section 2(5) of the Act.

3. As of March 3, 2009, Respondent was maintaining and has since maintained a hiring policy under which it refused to consider for hire those employee applicants who would not in some fashion renounce their Section 7 rights, usually by requiring them to sign a yellow dog agreement.

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[16] Section 7 of the Act states in its entirety: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

4. There is insufficient credible evidence to find Respondent committed any other unfair labor practices alleged in the complaint.

Based upon these findings of fact and conclusions of law and on the entire record, I issue the following recommended [17]

ORDER

Respondent, Alliance Mechanical, Inc., Eagle, Colorado, its officers, agents, and representatives, shall

1. Cease and desist from:

   a. Maintaining any hiring policy or practice under which it refuses to consider for hire employee applicants unless they renounce their Section 7 rights, including requiring them to sign a yellow dog agreement.

   b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

   a. Rescind the hiring policy and practices, including using yellow dog contracts, under which it refuses to consider for hire employees who are union members or who have union backgrounds or union employment histories.

   b. Make whole, with interest, any employment applicant after March 2009 who it failed to consider for employment due to its unlawful employment policy.

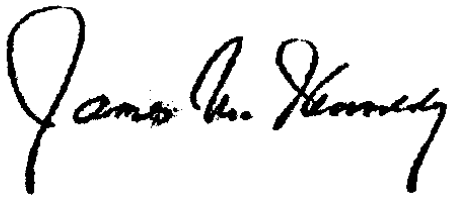
   c. Within 14 days after service by the Region, post at its office in Eagle, Colorado copies of the attached notice marked "Appendix." [18] Copies of the notice, on forms provided by the Regional Director for Region 27 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since March 3, 2009.

[17] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

d. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.



James M. Kennedy
Administrative Law Judge

Dated, Washington, D.C. July 23, 2010

"Appendix"

Notice to Employees
Posted By Order of the
National Labor Relations Board
An Agency Of The United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain any hiring policy or practice under which we refuse to consider for hire employee applicants unless they renounce their Section 7 rights, including requiring such individuals to sign a yellow dog agreement..

WE WILL NOT in any like or related manner interfere with, restraine, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our hiring policies and practices, including using yellow dog contracts, under which we refused to consider for hire employees who are union members or who have union backgrounds or union employment histories.

WE WILL make whole, with interest, any employment applicant after March 2009 whom we failed to consider for employment due to our unlawful employment policies.

ALLIANCE MECHANICAL, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 17th Street, 7th Floor, North Tower, Denver, CO 80202-5433
(303) 844-3551, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (303) 844-3554.